



DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 15

[Docket No. FR-5624-F-02]

RIN 2501-AD57

Revision of Freedom of Information Act Regulation

AGENCY: Office of the Deputy Secretary, HUD.

ACTION: Final rule.

SUMMARY: This final rule amends HUD's regulations implementing the Freedom of Information Act (FOIA) to update and streamline HUD's current FOIA regulation. Specifically, it updates HUD's regulations to reflect statutory changes to the FOIA, current HUD organizational structure, and current HUD policies and practices with respect to the FOIA. In addition, the rule uses current cost figures in calculating and charging fees. This final rule also incorporates changes made upon further evaluation of HUD's FOIA Regulation and in response to public comments received.

DATES: Effective: **[Insert date 30 days after date of publication in the FEDERAL REGISTER].**

FOR FURTHER INFORMATION CONTACT: Dolores W. Cole, Director, FOIA and Executive Correspondence, Office of Administration, Department of Housing and Urban Development, 451 7th Street, SW, Room 10139, Washington, DC 20410-0500; telephone number 202-402-2671 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number via TTY by calling the Federal Relay Service at telephone number 1-800-877-8339 (this is a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

HUD's regulations at 24 CFR part 15 contain the policies and procedures governing public access to HUD records under the FOIA (5 U.S.C. 552). Subject to certain statutory exceptions, the FOIA gives persons the right to request and receive a wide range of information from any Federal agency. The FOIA has been amended several times since its enactment in 1966. In 2007, significant amendments to the FOIA were made by the Openness Promotes Effectiveness in our National Government Act of 2007 (OPEN Government Act) (Pub. L. 110-175, approved December 31, 2007). The OPEN Government Act made several amendments to procedural issues affecting FOIA administration, including the protection of the fee status for news media, the time limits for agencies to act upon FOIA requests, the availability of agency records maintained by a private entity, the establishment of a FOIA Public Liaison and FOIA Requester Service Center, and the requirement to describe the exemptions authorizing the redaction of material provided under the FOIA.

In addition to these statutory changes, several policy directives have been issued that affect HUD's FOIA program. These policy directives include Presidential memoranda dated January 21, 2009, entitled "Freedom of Information Act" (74 FR 4683, January 26, 2009), which applies a presumption of disclosure in FOIA decision-making and "Transparency and Open Government" (74 FR 4685, January 26, 2009), which encourages Federal agencies to harness new technologies to proactively post online information about their operations and decisions consistent with applicable law. As required by the Presidential memoranda, on March 19, 2009, Attorney General Eric Holder issued comprehensive new FOIA guidelines (see <http://www.justice.gov/ag/foia-memo-march2009.pdf>). The Attorney General's guidance further

advises that agencies should release information to the fullest extent of the law, including information that may be legally withheld, provided there is no foreseeable harm to an interest protected by an exemption or the disclosure is not prohibited by law. In addition, the Attorney General's FOIA guidelines emphasized that agencies must have effective systems in place for responding to FOIA requests.

Consistent with this law and guidance, HUD undertook a comprehensive review of its FOIA regulation. As part of this review, HUD looked to the proposed updated FOIA regulation published by the Department of Justice (DOJ) on March 21, 2011 (76 FR 15236). DOJ intended that its regulation serve as a model for all agencies in updating their own FOIA regulations.¹ As a result of its review, HUD published a proposed rule on May 31, 2013 (78 FR 32595), modeled on DOJ's proposed regulation, to incorporate changes enacted by the OPEN Government Act of 2007, reflect developments in case law, include current cost figures for calculating and charging fees, and enhance the administration and operation of HUD's FOIA program by increasing the transparency and clarity of the regulation.

II. Changes and Clarifications Made in This Final Rule

This final rule follows publication of the May 31, 2013, proposed rule and takes into consideration the public comments received on the proposed rule. In response to public comment, a discussion of which is presented in the following section of this preamble, and in further consideration of issues addressed at the proposed rule stage, the Department is making the following changes at this final rule:

¹ See, <http://www.justice.gov/sites/default/files/testimonies/witnesses/attachments/03/15/11/03-15-11-oip-pustay-testimony-re-the-freedom-of-information-act--ensuring-transparency-and-accountability-in-the-digital-age.pdf>.

- HUD is revising § 15.103(c) to state that HUD will provide written notice to requesters when the time limits for HUD's response will be delayed. HUD will also provide the requester with the date by which HUD expects to complete its processing of the request.
- HUD is revising § 15.104(c)(3) to mirror the language of the FOIA. Specifically, HUD is removing the requirement that a representative of the news media, if not a full-time member of the news media, should establish that he or she is a person whose main professional activity or occupation is information dissemination.
- HUD is revising § 15.106(c) to reduce the duplication costs that HUD will charge for a paper photocopy of a record from \$0.18 per page to \$0.10 per page.
- HUD is revising § 15.107(a) to refer to the most current Executive order regarding classified information, which is Executive Order 13526, issued December 29, 2009.
- HUD is removing proposed § 15.109 from this final rule. Upon review HUD has determined that, § 15.109, entitled "Mortgage sales," directed itself to a specific HUD program rather than establish disclosure policy applicable throughout the Department. In addition, § 15.109 as proposed did not accurately describe the process that HUD uses to address FOIA requests for information arising out of HUD's mortgage sales program. As a result, HUD is removing § 15.109 as proposed from this final rule.
- HUD is revising § 15.110(a) of the proposed rule (redesignated as § 15.109(a) in this final rule) to clarify that appeals may be submitted electronically.
- HUD is revising § 15.111(a)(2) of the proposed rule (redesignated as § 15.110(a)(2) in this final rule) by adding paragraph (iii) to provide that HUD will notify requesters of dispute resolution services in its FOIA appeal determination response letter.

III. Analysis of Public Comments

The public comment period for the May 31, 2013, proposed rule closed on July 30, 2013, and HUD received three public comments on the proposed rule. Comments were submitted by a nonprofit organization devoted to issues of effective government and by two members of the public. HUD reviewed the comments and considered responses to them. This section presents the significant issues, questions, and suggestions submitted by the commenters and HUD's responses.

Comment: HUD should expand online disclosures. One commenter recommended that HUD adopt a policy of proactively identifying records that are of interest to the public and posting such records online without waiting for FOIA requests. Accordingly, the commenter recommended that § 15.101 be revised to state that "HUD will proactively identify and disclose additional records of interest to the public." The commenter added that the E-FOIA Act of 1996 mandates agencies to post online any information that has been released in response to a FOIA request and "is likely to become the subject of subsequent requests." The commenter stated that some agencies have adopted the practice of posting all released records and suggested that HUD adopt this policy by revising its proposed rule to read: "HUD will post all records released in response to FOIA requests in a searchable format on the agency website." Finally, the commenter stated that HUD should also revise § 15.101 by adopting a policy of publishing online its indexes of disclosed records.

Response: Section 15.101 revises HUD's FOIA regulation to reflect its current practice of proactively identifying and disclosing frequently requested records without waiting for a FOIA request. HUD developed the list of documents that it posts without request based on its prior experience regarding agency records that generally are of interest to the public. This list is not exhaustive and the final rule provides HUD the flexibility to post additional records without

request. Releasing all records requested, along with an index, as requested by the commenter, would be excessively burdensome for the agency. HUD believes that § 15.101, as drafted, successfully balances its commitment to transparency as directed by President Obama's memorandum and Attorney General Holder's FOIA Guidance, within the scope of HUD's available resources. Accordingly, HUD has determined not to revise this section as the commenter recommended.

Comment: Information about the record sought. A commenter stated that clear and open communications between requesters and agency staff is vital to an effective, user-friendly FOIA process. Toward this end, the commenter recommended that HUD revise § 15.102(d)(2) to delete the first sentence that provides that FOIA requests "include, whenever possible, detailed and specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record," and substitute simply that FOIA requests should "reasonably describe the records sought." The commenter also recommended that HUD delete the last sentence of this paragraph, which reads "Insufficient descriptions may lead HUD officials to contact the requester to seek additional information for their record search."

Response: HUD agrees that clear and open communications is vital to an effective and user-friendly FOIA process. Based on HUD's experience, § 15.102(d)(2) supports this goal by describing the type of information that will assist HUD to more promptly and effectively respond to a FOIA request. HUD therefore declines to revise § 15.102(d)(2) as suggested by the commenter.

Comment: Notification of further clarification needed. A commenter stated that HUD should adopt a policy stating that it will contact the requester to seek clarification before denying a request on the basis of its not reasonably describing the records sought. The

commenter suggested that HUD revise this section of the rule to state: “If HUD believes that a request may not reasonably describe the records sought, HUD will contact the requester to seek clarification. HUD will provide at least 30 days for the requester to respond. If the request has not been clarified after 30 days, HUD may decide to deny the request for not reasonably describing the records sought. If HUD determines that it must deny the request for not reasonably describing the records sought, it will notify the requester under the procedures in § 15.105(d)(2).”

Response: HUD’s current policy is to request clarification prior to issuing an adverse determination based on a requester’s failure to reasonably describe the records sought. In addition, depending on the specific request, HUD may on a case-by-case basis establish time limits for the requester to provide clarification. HUD, therefore, believes that imposing a 30-day time period would unnecessarily limit the staff’s ability to exercise discretion in processing these requests. HUD, therefore, declines to revise § 15.105(d)(2) as recommended by the commenter.

Comment: Notification of delayed processing. A commenter recommended that HUD revise § 15.103(c) to state that HUD will notify requesters in writing as is required by FOIA when processing will be delayed.

Response: HUD agrees with the commenter and revises § 15.103(c) of the final rule to mirror the language of the FOIA by providing that, in unusual circumstances, the time limits prescribed in the regulation may be extended by written notice to the requester making such request. The written notice will also set forth the unusual circumstances for such extension and the date on which a determination is expected to be released.

Comment: Phrasing of revised language in § 15.104(c)(3). A commenter stated that language in proposed § 15.104(c)(3), which would require requesters who are not full-time

members of the news media to submit a statement establishing that the requester “is a person whose main professional activity or occupation is information dissemination” when requesting expedited processing of a request, changes the meaning of FOIA. According to the commenter, this requirement is not found in FOIA and excludes an entire class of individuals, such as bloggers and other participants and thought leaders of the digital world who may be well positioned to expedite dissemination of information. The commenter recommended that the reference to “main professional activity or occupation” be removed and that § 15.104(c)(3) be revised to mirror FOIA.

Response: HUD agrees that the language in the final rule should mirror the language in the FOIA and therefore revises § 15.104(c)(3) to require that the requester be “primarily engaged in disseminating information.” References to requirements that the requester, “if not a full-time member of the news media, should establish that he or she is a person whose main professional activity or occupation is information dissemination,” have been deleted.

Comment: Notification of rerouting and referrals. Two commenters recommended that HUD revise the rule to improve communications with the requester. These commenters recommended that HUD notify the requester if it reroutes the request to another government agency or second HUD office, as is permitted during the 10-day window immediately following HUD’s receipt of the initial FOIA request. The commenters described this change as a modest step that is consistent with the policies of other Federal agencies and which would benefit HUD by reducing the number of requester inquiries made to the HUD FOIA office.

Response: HUD’s current policy is to notify requesters that their request is being rerouted or referred to another Federal agency or a second HUD office. Federal agencies to which requests are referred follow their own policies to ensure that requesters are notified that

their FOIA requests have been received. In addition, requesters can identify the HUD FOIA office to which their request has been rerouted by checking the status of their request online at <http://www.hud.gov/FOIA>. Because these options are available to requesters, HUD declines to revise § 15.105 to adopt the commenters' recommendations.

Comment: Keeping requesters informed regarding updates on the status of their FOIA requests. A commenter recommended that HUD revise § 15.105 to include provisions that would require HUD to notify all requesters as soon as practicable of the estimated time it will take to complete a request and provide requesters with the opportunity to reformulate their requests. The commenter also recommended that HUD revise the rule to provide on the agency's website automated updates on the status of FOIA requests and suggested that HUD can implement this recommendation by joining the multiagency portal FOIA online, which allows requesters to track the status of requests online.

Response: Section 15.103(a) provides that HUD generally will respond to a FOIA request within 20 working days of receipt. As discussed in this preamble, HUD is revising this section in the final rule to state that it will provide written notice to requesters when it extends the time to process a request, and will also provide the requester with the date by which HUD expects to complete its processing of the request. Given the number, unpredictability, and variability in type and scope of FOIA requests that HUD receives, however, it would be extremely difficult for HUD to offer specific dates by which it could estimate the processing time for any specific FOIA request not subject to § 15.103(a). In addition, HUD provides requesters the ability to verify the status of their FOIA requests through an online tool that is similar to FOIAonline and that is available at <http://www.hud.gov/FOIA>. Finally, HUD believes that the rule already addresses the commenter's concern that requesters be granted an

opportunity to reformulate requests during the process. For example, § 15.103(c) provides that HUD will offer the requester the opportunity to limit the scope of a request if HUD determines that providing responsive documents will take more than the 10 working days established in § 15.103(a). For these reasons, HUD declines to revise the rule as recommended by the commenter.

Comment: Electronic communications. A commenter recommended that HUD adopt a policy to communicate with requesters by email, where appropriate, as digital communications are changing the way government connects with citizens, and email communications could result in cost savings for the agency.

Response: The FOIA does not require agencies to use a specific means to communicate with requesters. HUD currently communicates with requesters by email, when appropriate, and will continue to do so. At the same time, HUD requires the discretion to use physical mail when it deems necessary. For these reasons, HUD declines to revise the rule as recommended by the commenter.

Comment: Plain communications. A commenter stated that the Plain Writing Act of 2010 directs agencies to use “writing that is clear, concise, well-organized, and follows other best practices appropriate to the subject or field and intended audience” in any document that “provides information about Federal Government benefit or service.” The commenter recommended that HUD revise § 15.105 to state: “HUD will use plain language in all communications with requesters.”

Response: HUD’s current policy is to use plain language for all communications with the public. Some requests, however, require the production of records that are inherently technical or drafted for audiences with more technical backgrounds or expertise than the general

public. As a result, HUD concludes that adding the language suggested by the commenter would be superfluous and may mislead requesters to expect HUD to translate technical documents into plain language. HUD therefore declines to amend this section in the final rule as requested by the commenter.

Comment: Release records on a rolling basis. A commenter stated that HUD should revise § 15.105 to require HUD to release records on a rolling basis, where requests involve a voluminous amount of material or searches in multiple locations.

Response: HUD's existing policy allows individual HUD FOIA offices to decide whether to release voluminous amounts of records on a rolling basis or all at once, depending on the specific request, the difficulty of collecting records responsive to the request, and the effective administration of the office's internal FOIA processing. HUD declines to revise this section of the rule in order to permit individual HUD FOIA offices the continued discretion over the appropriate approach to releasing records.

Comment: Rate of per-page printing. Two commenters stated that HUD's fee of \$0.18 per page is a potential impediment to requests from members of the public, that it is higher than the rate imposed by other agencies, and that it does not reflect the amount that it costs HUD to print on a page. Both commenters recommended that HUD establish a standard fee of \$0.10 per page. In addition, one commenter recommended that HUD revise the regulation to provide that it will not charge a fee if the total fee does not exceed \$50, instead of the \$25 threshold proposed by § 15.106(d)(4). The commenter stated that charging requesters the costs for producing small FOIA requests is uneconomical and contributes to processing delays. The commenter also stated that revising the \$25 threshold would streamline the processing of requests that cost HUD less than \$50.

Response: HUD appreciates the commenters' recommendations. HUD has reviewed its FOIA fee structure and agrees that it should revise its longstanding policy of charging \$0.18 per page to the standard fee of \$0.10 per page. Section 15.106(c) is revised to reflect this change. HUD's cost of responding to a request, however, has not changed. As a result, HUD will continue its practice of not charging the requester for processing a request if the total fee does not exceed \$25. Based on HUD's experience, even at this \$25 threshold, most requesters will still not be charged a processing fee.

Comment: Fee Waivers. A commenter stated that the proposed § 15.106(k)(5), which would give HUD discretion to consider "the cost effectiveness of its investment of administrative resources" when deciding whether to grant requests for a fee waiver or reduction, contradicts the plain language of FOIA. The commenter asserted that FOIA provides that agencies do not have authority to consider additional factors when deciding to waive or reduce fees if the statutory conditions are met. Accordingly, the commenter recommended that § 15.106(k)(5) be struck from the final rule.

Response: Section 552(a)(4)(A)(i) of the FOIA states that, "[i]n order to carry out the provisions of this section, each agency shall promulgate regulations...establishing procedures and guidelines for determining when such fees should be waived or reduced." Accordingly, HUD is properly exercising its statutorily granted discretion in establishing that it will consider additional factors in deciding whether to grant requests for a fee waiver or reduction. HUD therefore declines to remove § 15.106(k)(5) from the final rule.

Comment: Applying "foreseeable harm" standard for withholding. A commenter stated that HUD should adopt a policy of applying a presumption of openness in processing requests and of only withholding information if it reasonably foresees that disclosure would

harm an interest protected by one of the statutory exemptions. According to the commenter, applying this “foreseeable harm” standard would help to ensure that HUD does not improperly withhold information. The commenter recommends that HUD revise § 15.107 to add that “HUD will conduct a foreseeable harm analysis, which clearly identifies the harm that would occur with disclosure.”

Response: HUD withholds documents according to the nine FOIA statutory exemptions that protect various records from disclosure (*see* 5 U.S.C. 552(b)), in conjunction with existing case law and publicly available guidance issued by the Department of Justice. When the request is one that appropriately raises questions of foreseeable harm, HUD staff analyzes the request in light of this standard. Not all requests require this level of review. Accordingly, HUD declines to amend the regulation to incorporate a standard that is not currently reflected in the FOIA.

Comment: Technical amendment to source reference. A commenter recommended that § 15.107(a) be updated to refer to the most current Executive order regarding classified information, which is Executive Order 13526, issued December 29, 2009.

Response: HUD agrees with the commenter and updates this reference in the final rule.

Comment: Avoiding frivolous claims of confidential business information. A commenter suggested that HUD require that submitters of confidential business information use good faith efforts to designate any information that such submitters consider exempt from disclosure under FOIA Exemption 4, and that HUD indicate in this final rule what constitutes a “good faith effort.” Specifically, the commenter suggested editing § 15.108(b) to read: “A blanket designation on each page of a submission that all information contained on the page is protected from disclosure under Exemption 4 presumptively will not be considered a good faith effort.”

Response: Section 15.108(b) of the rule already requires submitters of business information to “use good faith efforts to designate...any portion of its submission that it considers to be protected from disclosure under Exemption 4.” Furthermore, the commenter’s suggested language could create undue processing delays by creating the presumption that entire pages marked as “business information” are not marked as such in good faith. In practice, the determination of what constitutes a good faith effort does not hinge on the number of submitted pages entirely marked as “business information.” HUD therefore declines to amend this provision.

Comment: Decreased notifications to submitters of “business information.” The commenter also suggested that in the interest of avoiding undue delays, HUD establish that it is unnecessary to notify submitters of business information if HUD determines that the claim of confidential business information is obviously frivolous. The commenter also recommended that HUD provide specific time limits, generally 5 working days, for submitters to object to the release of submitted information and this proposed change be incorporated in § 15.108(e).

Response: HUD’s current policy regarding the obligation to notify submitters of business information is to provide all of the basic procedural protections that HUD is required to give submitters under Executive Order 12600. It currently is already HUD’s practice to grant submitters a reasonable number of days to object to the release of submitted information, as is required by Executive Order 12600, and to require that such objections be justified. HUD therefore declines to amend this provision in the final rule.

Comment: Copies of the original request and adverse determination. A commenter stated that requiring requesters to provide a copy of their original request is unnecessary and unfair because original requests might be difficult to locate after years pass between the time of

submission and the appeal. The commenter added that HUD should remove this requirement, as well as the requirement for a copy of the adverse determination, from the proposed rule because many individuals do not have access to a scanner or a photocopier. The commenter suggested that HUD instead “encourage” appellants to provide these two copies.

Response: Because HUD often processes multiple requests from the same requester, provision of a copy of the original request and of the original adverse determination helps HUD’s reviewing staff to ensure that they issue accurate responses to the original concern or request. Requesting the submission of these copies with an appeal does not pose an unnecessary and unfair burden upon requesters. HUD believes that most requesters have several tools available to make photocopies of important documents, with no exceptional inconvenience to them. In exceptional circumstances, however, requesters might be able to obtain a scanned or printed copy of their original request by contacting the HUD FOIA office handling the request. HUD, therefore, declines to amend § 15.110 of the proposed rule as recommended.

Comment: Providing a longer time period to submit appeals. A commenter suggested that HUD provide requesters with a minimum of 60 days to submit their administrative appeals, instead of the 30 days provided under the rule. The commenter added that this would provide requesters adequate time to gather the necessary information and to formulate any arguments they wish to make in the appeal.

Response: The FOIA provides agencies discretion in setting forth deadlines by which requesters must file their administrative appeals of adverse determinations. HUD’s current policy of allowing a requester 30 days to submit an appeal is intended to ensure that FOIA requests and disputes are resolved as promptly as possible. Because an extension of this filing

period would defeat this policy goal, HUD declines to amend this provision to, instead, grant requesters 60 days to file appeals to adverse determinations as recommended.

Comment: Electronic process for appeal submissions. A commenter recommended that HUD provide requesters the option to submit their administrative appeals by email or through the HUD website, as opposed to the current process, which requires the submission of appeals “in writing to the address specified in HUD’s notice responding to a FOIA request.”

Response: HUD does not believe that § 15.110 of the proposed rule (redesignated as § 15.109 in this final rule) precludes the submission of an appeal electronically. Nevertheless, HUD has clarified that appeals may be submitted electronically by stating, “If the letter of appeal is *transmitted electronically* or by a means other than the U.S. Postal Service, it must be received in the appropriate office by the close of business on the 30th calendar day after the date of HUD’s letter of determination.” HUD agrees with the commenter, however, that the public should have the option of submitting their appeals electronically. As a result, HUD has recently expanded its FOIA management system (FMS2), to accommodate the receipt of FOIA appeals electronically. HUD’s FOIA management system includes a public access link that allows members of the public to submit FOIA requests electronically and track the status of their requests. HUD agrees that extending these capabilities to the submission of appeals will expedite the review of appeals and ensure that the public is better informed regarding the status of their appeals.

Comment: Notifying requesters of dispute resolution services available for appeal determinations. A commenter stated that HUD should adopt a policy of notifying requesters of dispute resolution services in appeal determination letters. The commenter added that HUD should revise the language at § 15.111(a)(2)(ii) of the proposed rule to add: “HUD will provide the requester with the name and contact information of the Office of Government Information

Services, which offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation.”

Response: HUD has considered the commenter’s suggestion and agrees to provide requesters notification of dispute resolution services in the appeal determination letters. In addition, HUD will post the contact information for the Office of Government Information Services on its FOIA website. See § 15.110(a)(2)(iii).

IV. Findings and Certifications

Executive Order 12866 and Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if the regulation is necessary, to select the regulatory approach that maximizes net benefits. Because this final rule incorporates changes enacted by the OPEN Government Act of 2007 and otherwise updates and streamlines HUD’s current FOIA regulation, the rule was determined to not be a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and therefore was not reviewed by the Office of Management and Budget.

Environmental Impact

This final rule is categorically excluded from environmental review under the National Environmental Policy Act (42 U.S.C. 4321). The revision of FOIA-related provisions of 24 CFR part 15 falls within the exclusion provided by 24 CFR 50.19(c)(1) in that it does not direct, provide for assistance or loan and mortgage insurance for or otherwise govern or regulate real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This final rule establishes the process by which HUD will respond to requests for information under the FOIA. Costs assessed by HUD for search, review, and duplication required to process the information requested by a requester are limited by the FOIA to direct costs and are not economically significant. As a result, the final rule will not have a significant economic impact on a substantial number of small entities.

Executive Order 13132, Federalism

Executive Order 13132 (entitled “Federalism”) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. This final rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive order.

Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and on the private sector. This final rule does not impose any Federal mandates on any state, local, or tribal governments, or on the private sector, within the meaning of the Unfunded Mandates Reform Act of 1995.

List of Subjects in 24 CFR Part 15

Classified information, Courts, Freedom of information, Government employees, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, HUD amends 24 CFR part 15 as follows:

PART 15—PUBLIC ACCESS TO HUD RECORDS UNDER THE FREEDOM OF INFORMATION ACT AND TESTIMONY AND PRODUCTION OF INFORMATION BY HUD EMPLOYEES

Subpart A—General Provisions

1. The authority for 24 CFR part 15 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 5 U.S.C. 552.

2. Revise subpart A to read as follows:

Subpart A—General Provisions

Sec.

15.1 General provisions.

15.2 Definitions.

§ 15.1 – General provisions.

(a) Scope. Requests for material from HUD will be processed as set forth in this part.

The Federal Housing Administration and the Government National Mortgage Association are components of HUD and are also covered by this part.

(b) Subpart B. Subpart B of this part contains the rules that HUD follows in processing requests for records under the Freedom of Information Act (FOIA) (5 U.S.C. 552). These rules should be read together with the FOIA, which provides additional information about access to

records maintained by HUD. Information routinely provided to the public as part of a regular Department activity may be provided to the public without following this subpart.

(c) Subpart C. Subpart C of this part describes the procedures to be followed and standards to be applied in processing demands for the production of material or provision of testimony in legal proceedings among private litigants.

(d) Subpart D. Subpart D of this part describes the procedures to be followed and standards to be applied in processing demands for the production of material or provision of testimony in legal proceedings in which the United States is a party.

(e) Inspector General. Subparts B and C of this part do not apply to the Office of Inspector General. The procedures that apply to the Office of Inspector General are described in parts 2002 and 2004 of this title.

§ 15.2 – Definitions.

(a) The following definitions apply to this part.

Agency record means any documentary material that is either created or obtained by an agency in the transaction of agency business and is under agency control. “Agency record” does not include records that are not already in existence and which would have to be created specifically to meet a request.

Business information means commercial or financial information provided to HUD by a submitter that arguably is protected from disclosure under Exemption 4 (42 U.S.C. 552(b)(4)) of the FOIA.

FOIA means the Freedom of Information Act (5 U.S.C. 552).

HUD means the Department of Housing and Urban Development.

Review means the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. Review time includes processing any record for disclosure (for example, doing all that is necessary to redact it and prepare it for disclosure). Review costs are recoverable even if a record ultimately is not disclosed. Review time includes time spent considering any formal objection to disclosure, made by a business submitter under § 15.108, but does not include time spent resolving general legal or policy issues regarding the application of exemptions.

Search means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format.

Secretary means the Secretary of Housing and Urban Development.

Submitter means any person or entity that provides business information, directly or indirectly, to HUD. The term includes, but is not limited to, corporations, State governments, and foreign governments.

(b) The following definitions apply to subparts C and D of this part.

Appropriate Associate General Counsel means the Associate General Counsel for Litigation or the Associate General Counsel for HUD Headquarters employees in those programs for which the Associate General Counsel provides legal advice.

Appropriate Regional Counsel means the Regional Counsel for the regional office having delegated authority over the project or activity with respect to which the information is sought. For assistance in identifying the Appropriate Regional Counsel, see appendix A to this part.

Authorized Approving Official means the Secretary, General Counsel, Appropriate Associate General Counsel, or Appropriate Regional Counsel.

Demand means a subpoena, order, or other demand of a court or other authority that is issued in a legal proceeding and any accompanying submissions.

Employee of the Department means a current or former officer or employee of the United States appointed by or subject to the supervision of the Secretary, but does not include an officer or employee covered by part 2004 of this title.

Good cause means necessary to prevent a miscarriage of justice or to promote a significant interest of the Department.

Legal proceeding includes any proceeding before a court of law or other authority; e.g., an administrative board or commission, a hearing officer, an arbitrator, or other body conducting a quasi-judicial or legislative proceeding.

Legal proceeding among private litigants means any legal proceeding in which the United States is not a party.

Legal proceeding in which the United States is a party means any legal proceeding including as a named party the United States, the Department of Housing and Urban Development, any other Federal executive or administrative agency or department, or any official thereof in his official capacity.

Material means either documents or information contained in, or relating to contents of, the files of the Department, or documents or information acquired by any person, while such person was an employee of the Department, as a part of the performance of his or her official duties or because of his or her official status.

Production means to produce material by any means other than through the provision of oral testimony.

Testimony means any oral or written statements made in litigation under oath or penalty of perjury.

United States means the Federal Government of the United States (including the Department), the Secretary, and any employees of the Department in their official capacities.

3. Revise subpart B to read as follows:

Subpart B. Procedures for Disclosure of Records Under the FOIA

Sec.

- 15.101 Proactive disclosures of department records.
- 15.102 Requirements for making requests for records.
- 15.103 Timing of responses to requests.
- 15.104 Procedures for processing FOIA requests.
- 15.105 Responses to requests.
- 15.106 Fees.
- 15.107 Documents generally protected from disclosure.
- 15.108 Business information.
- 15.109 Appeals.
- 15.110 HUD response to appeals.

§ 15.101 Proactive disclosures of department records.

(a) In General. Records that are required to be made available for public inspection and copying are accessible on the Department's website at <http://www.hud.gov/FOIA>. Published agency records, whether or not they are available for purchase, are made available for examination. Each HUD office (headquarters and field) has a FOIA Public Liaison that can assist individuals in locating records. A list of the Department's FOIA Public Liaisons is available at <http://www.hud.gov/FOIA>.

(b) Electronic FOIA reading room. As required by 5 U.S.C. 552(a)(2), HUD makes records created on or after November 1, 1996, available through its electronic FOIA Reading Room, located on HUD's FOIA website at <http://www.hud.gov/FOIA>. These records include:

- (1) Final opinions and orders.
- (2) Public access to high-value, machine readable datasets via [http://www/data.gov](http://www.data.gov).
- (3) Statements of policy and interpretation, including:
 - (i) HUD's Client and Information Policy Systems (HUDCLIPS);
 - (ii) Housing policy;
 - (iii) Public and Indian Housing policy and regulations;
 - (iv) Public and Indian Housing policy and guidance (PHA Plans); and
 - (v) Community Planning and Development policy and guidance.
- (4) Administrative staff manuals.
- (5) HUD's online library.
- (6) Fair housing information.

(c) Frequently requested materials. HUD also makes frequently requested materials available on its FOIA website at <http://www.hud.gov/FOIA>. These frequently requested materials include information related to:

- (1) Highest-scoring funding grant applications.
- (2) Purchase charge cardholders.
- (3) FHA refunds.
- (4) FHA-approved lenders.
- (5) Homes for sale.
- (6) How to buy a HUD home.

- (7) How to apply for public housing and Section 8 housing.
- (8) Housing for the elderly.
- (9) Housing for individuals with disabilities.
- (10) HUD contracting home page.
- (11) FHA mortgage insurance programs.
- (12) HUD handbooks.
- (13) HUD programs.
- (14) HUD telephone directory.
- (15) HUD homes listing.
- (16) HUD's organization.
- (17) Multifamily housing data.
- (18) Public housing authority contact information.
- (19) Weekly listing of multifamily properties for sale.
- (20) Catalog of Federal Domestic Assistance (CFDA) materials.
- (21) Grants.
- (22) FOIA request logs.

§ 15.102 Requirements for making requests for records.

(a) In general. Any request for HUD records must be made in writing and submitted to the FOIA Public Liaison in the HUD field office where the records are located or to the Office of the Executive Secretariat in HUD Headquarters if the request is for records located in HUD Headquarters.

(b) HUD field office records. Requests for records located in a HUD field office may be submitted by mail (including courier or delivery service), email, or facsimile to the FOIA Public Liaison at the field office.

(c) HUD headquarters records. Requests for records located in HUD Headquarters may be submitted via an electronic request form on HUD's FOIA website at <http://www.hud.gov/FOIA>. Requests can also be submitted in person or by mail (including courier or delivery service), email, or facsimile to the Office of the Executive Secretariat in HUD Headquarters.

(d) Form of requests. FOIA requests should:

(1) Be in writing and clearly identifiable as a FOIA request. To facilitate identification, the requester should place the phrase "FOIA Request" on the front of the envelope or on the cover sheet or other transmittal document used when submitting the request in person or by mail, email, facsimile, or electronic request form;

(2) Include, whenever possible, detailed and specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record. The more specific the FOIA request for records, the more likely HUD officials will be able to locate the records requested. Requests for categories of information should be for specific and well-defined categories. Insufficient descriptions may lead HUD officials to contact the requester to seek additional information for their record search;

(3) Indicate the form or format in which the requester would like the record made available, if the requester has a preference;

(4) Specify the fee amount the requester is willing to pay. In general, HUD provides records at no cost up to \$25. Requesters are required to agree to pay for any costs that exceed

\$25. Requesters may also request a dollar amount above which HUD should consult with them before they agree to pay the fee. If a requester seeks a fee waiver or reduction, the requester should include this request with the FOIA disclosure request and should describe, consistent with § 15.106(k), how the disclosure of the requested information is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester;

(5) Indicate the fee category that the requester believes applies to each of his or her requests (fee categories are defined in § 15.106(b));

(6) Include verification information of the requester's identity, if the requester requests agency records pertaining to the requester, a minor, or an individual who is legally incompetent. Information about what constitutes acceptable verification information can be found in HUD's Privacy Act regulations in 24 CFR part 16;

(7) Contain signed authorization from the other person, if the requester makes a request on another person's behalf for information about that person. If necessary, HUD will inform the requester of the authorization needed from the other person and give the requester an opportunity to provide such authorization. Requests for information about another person should be accompanied by either written, notarized authorization or proof that the individual is deceased (for example, a copy of a death certificate or an obituary), or the request will be deemed insufficient; and

(8) Contain a detailed explanation of the basis for the request, if the requester makes a request for expedited processing as provided by § 15.104(c). The requester should also include a statement certifying the truth of the circumstances alleged or other evidence, acceptable to HUD, of the requester's compelling need.

§ 15.103 Timing of responses to requests.

(a) In general. HUD will generally respond to a FOIA request within 20 working days, depending on the size of the request. The 20-day period will begin on the day the request is received by the appropriate component of HUD, but in any event not later than 10 working days after the request is received by any component of HUD designated to receive FOIA requests.

(b) Tolling the 20-day time period. Under the OPEN Government Act of 2007, HUD may toll the 20-day period:

(1) One time to make a reasonable request for additional information from the requester;
or

(2) As many times as necessary to clarify issues regarding fee assessment with the requester. The agency's receipt of the requester's response to the agency's request for information or resolution of all fee assessment issues ends the tolling period.

(c) Extension of time periods for processing a request. In unusual circumstances, as defined in this paragraph, HUD may extend the time period for processing a FOIA request. In such circumstances, HUD will provide the requester with written notice setting forth the unusual circumstances for the extension and the date on which a determination is expected to be dispatched. This date will not exceed 10 working days beyond the general time limit established in paragraph (a) of this section. If processing a request would require more than 10 working days beyond the general time limit established in paragraph (a) of this section, HUD will offer the requester an opportunity to limit the scope of the request so that HUD may process it within the extra 10-day working period or arrange an alternative time period within which the FOIA request will be processed. For purposes of this section, unusual circumstances include:

(1) The need to search for and collect records not located in the office processing the request;

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records; or

(3) The need to consult with another agency or two or more HUD components having a substantial interest in the determination of the FOIA request.

(d) Aggregating multiple requests. (1) HUD may aggregate multiple requests in cases where unusual circumstances exist and HUD determines that:

(i) Certain requests from the same requester or from a group of requesters acting in concert actually constitute a single request; and

(ii) The requests involve clearly related matters.

(2) Aggregation of requests for this purpose will be conducted independent of aggregation of requests for fee purposes under § 15.106(h).

§ 15.104 Procedures for processing FOIA requests.

(a) In general. HUD will ordinarily respond to FOIA requests according to their order of receipt.

(b) Tracking number. FOIA requests will be logged in the order that they are received and be assigned a tracking number. A requester should use the tracking number to identify his or her request when contacting FOIA office for any reason.

(c) Expedited processing. (1) Requests and appeals will be taken out of order and given expedited treatment whenever it is determined that they involve:

(i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, if made by a person primarily engaged in disseminating information; or

(iii) The loss of substantial due process rights.

(2) A request for expedited processing may be made at the time of the initial request for records or at any later time. For a prompt determination, a request for expedited processing should be received by the proper office designated to receive FOIA requests as provided in § 15.102.

(3) A requester who seeks expedited processing should submit a statement, certified to be true and correct to the best of that person's knowledge and belief, explaining in detail the basis for requesting expedited processing. For example, a requester who makes a request under paragraph (c)(1)(ii) of this section, if not a full-time member of the news media, should establish that he or she is a person primarily engaged in disseminating information, though it need not be his or her sole occupation. A requester making a request under paragraph (c)(1)(ii) of this section also should establish a particular urgency to inform the public about the government activity involved in the request, beyond the public's right to know about government activity generally. The formality of certification may be waived as a matter of administrative discretion.

(4) HUD will make a determination within 10 calendar days of receipt by the appropriate component of HUD, as provided in § 15.103, whether to grant or deny a request for expedited processing and notify the requester of HUD's determination. FOIA requests accepted for expedited processing will be processed as soon as practicable and on a priority basis.

(d) Multitrack processing. (1) For requests that do not qualify for expedited processing, HUD may use two or more processing tracks by distinguishing between simple and complex

FOIA requests based on the following: the time and work necessary to process the FOIA request and the volume of agency records responsive to the FOIA request.

(2) When HUD uses multitrack processing, it may provide requesters in its slower track an opportunity to limit the scope of their requests in order to qualify for faster processing within the specified limits of HUD's faster track. When HUD chooses to provide this option, HUD will contact the requester by telephone, letter, or email, whichever is more efficient in each case.

§ 15.105 Responses to requests.

(a) Acknowledgements of requests. The FOIA office in the Office of the Executive Secretariat in HUD Headquarters and FOIA Public Liaison in each HUD field office will ordinarily send an acknowledgement letter to the requester that will confirm receipt of the request by the appropriate HUD office and provide an assigned tracking number, as provided by § 15.104(b), for further reference.

(b) Consultations, coordination, and referrals. When HUD receives a request for a record in its possession, it shall determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA or whether it should be disclosed as a matter of administrative discretion. If HUD determines that it is best able to determine whether the record is exempt from disclosure, then it shall do so. If HUD determines that it is not best able to make that determination, then it shall either:

(1) Respond to the request regarding that record, after consulting with the agency best able to determine whether to disclose it and with any other agency that has a substantial interest in it; or

(2) Refer the responsibility for responding to the request regarding that record to the agency that originated the record, but only if that agency is subject to the FOIA. Ordinarily, the

agency with which the record originated will be presumed to be best able to determine whether to disclose it.

(c) Fee estimates. HUD will notify the requester if HUD's estimate of the fee is more than the requester has agreed to pay. Consistent with § 15.106(e), the requester shall have 15 working days to agree to pay the higher fee.

(d) Forms of response. (1) Granting requests in whole or in part. Once HUD makes a determination to grant a request in whole or in part, it will notify the requester in writing. HUD will make a record available in the form or format requested, if the record is readily reproducible in that format. HUD will inform the requester in the notice of any fee charged under § 15.106 and disclose records to the requester promptly upon payment of any applicable fee. Records disclosed in part will be marked or annotated to show the amount of information deleted and the exemption(s) under which each deletion is made, unless doing so would harm an interest protected by an applicable FOIA exemption. The location of the information deleted and the exemption(s) under which the deletion is made will be indicated directly on the record itself, if technically feasible.

(2) Adverse determination of requests. If a determination is made to deny a request in any respect, HUD shall notify the requester of that determination in writing. Adverse determinations, or denials of requests, include: a determination to withhold any requested record, in whole or in part; a determination that a requested record does not exist, cannot be located, or has not been retained; a determination that a record is not readily reproducible in the form or format sought by the requester; a determination that what has been requested is not a record subject to the FOIA; a determination on any disputed fee matter, including a denial of a request for a fee waiver or reduction; and a denial of a request for expedited treatment. The denial letter

shall be signed by the Director of the Office of the Executive Secretariat, or a designee of the Director, in HUD Headquarters or the FOIA Public Liaison for the HUD field office where the adverse determination was made, and shall include:

- (i) The name and title or position of the person responsible for the denial;
- (ii) A brief statement of the reason(s) for the denial, including any FOIA exemption applied by HUD in denying the request;
- (iii) An estimate of the volume of records or information withheld, when appropriate, in number of pages or in some other reasonable form of estimation. This estimate does not need to be provided if the volume is otherwise indicated through deletions on records disclosed in part, or if providing an estimate would harm an interest protected by an applicable exemption; and
- (iv) A statement that the denial may be appealed as provided by § 15.109 and a description of the requirements for appeal.

§ 15.106 Fees.

(a) In general. HUD will charge for processing requests under the FOIA in accordance with paragraph (c) of this section, except where fees are limited under paragraph (d) of this section or where a waiver or reduction of fees is granted under paragraph (k) of this section. HUD shall collect all applicable fees before sending copies of requested records to a requester. In order to resolve any fee issues that arise under this section, HUD may contact a requester for additional information. Requesters shall pay fees by check or money order made payable to the United States Treasury.

(b) Definitions. For purposes of this section:

Commercial use means a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, which can include

furthering those interests through litigation. HUD shall determine, whenever reasonably possible, the use to which a requester will put the requested records. When it appears that the requester will put the records to a commercial use, either because of the nature of the request itself or because HUD has reasonable cause to doubt a requester's stated use, HUD shall provide the requester a reasonable opportunity to submit further clarification.

Direct costs means those expenses that HUD actually incurs in searching for and duplicating and, in the case of commercial use requests, reviewing records to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work and the cost of operating computers and other electronic equipment, such as for mainframe computer run time. Not included in direct costs are overhead expenses such as the costs of space and heating or lighting a facility.

Duplication means the process of making a copy of a document necessary to respond to a FOIA request. Such copies can take the form of paper copy, audiovisual materials, or machine readable documentation (e.g., diskette), among others. HUD shall honor a requester's specified preference of form or format of disclosure if the record is readily reproducible with reasonable efforts in the requested form or format by the office responding to the request.

Educational institution means:

- (i)(A) A preschool;
- (B) A public or private elementary or secondary school;
- (C) An institution of graduate higher education;
- (D) An institution of undergraduate higher education;
- (E) An institution of professional education; or

(F) An institution of vocational education, that primarily (or solely) operates a program or programs of scholarly research.

(ii) To be in this category, a requester should show that the request is authorized by, and is made under the auspices of, a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research. Records requested for the intention of fulfilling credit requirements are not considered to be sought for a scholarly purpose.

Other requester means any requester that does not fall within the categories of requesters described in this section.

Noncommercial scientific institution means an institution that is not operated on a “commercial” basis, as defined in this section, and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. To be in this category, a requester should show that the request is authorized by, and is made under the auspices of, a qualifying institution and that the records are not sought for a commercial use but are sought to further scientific research.

Representative of the news media, or news media requester, means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term news means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals that disseminate news and make their products available to the general public through a variety of means. For freelance journalists to be regarded as working for a news media entity, they should demonstrate a solid basis for expecting publication through a news media entity. A publication contract

would be the clearest proof, but HUD will also look to the past publication record of a requester in making this determination. To be in this category a requester should not be seeking the requested records for a commercial use. However, a request for records supporting the news dissemination function of the requester shall not be considered to be for a commercial use.

(c) Fees—(1) Schedule. In responding to FOIA requests, HUD will use the fee schedule set out in the following table, unless a waiver or reduction of fees has been granted under paragraph (k) of this section.

FOIA FEE SCHEDULE				
Activity	Rate	Commercial Use Requester	News Media, Educational Institution, or Noncommercial Scientific Institution Requester	Other Requester
(i) Professional search	\$13 per quarter hour	Applies	Does not apply	Applies. No charge for first 2 hours of cumulative search time
(ii) Professional review	\$13 per quarter hour	Applies	Does not apply	Does not apply
(iii) Clerical search	\$6 per quarter hour	Applies	Does not apply	Applies. No charge for first 2 hours of cumulative search time
(iv) Clerical review	\$6 per quarter hour	Applies	Does not apply	Does not apply
(v) Programming services required	Direct costs associated with search	Applies	Does not apply	Applies
(vi) Duplication costs	\$0.10 per page	Applies	Applies. No charge for first 100 pages	Applies. No charge for first 100 pages
(vii) Duplication costs – tape, CD ROM or diskette	Actual cost	Applies	Applies	Applies

(2) Search. (i) Search fees will be charged for all requests other than requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media, subject to the limitations of paragraph (d) of this section. HUD may charge for time spent searching even if HUD does not locate any responsive record or if HUD withholds the record(s) located as entirely exempt from disclosure.

(ii) For each hour spent by personnel searching for requested records, including electronic searches that do not require new programming, the fees will be \$13 per quarter hour for professional personnel and \$6 per quarter hour for clerical personnel.

(iii) Requesters will be charged the direct costs associated with conducting any search that requires the creation of a new program to locate the requested records.

(iv) For requests requiring the retrieval of records from any Federal records center, certain additional costs may be incurred in accordance with the Transactional Billing Rate Schedule established by the National Archives and Records Administration.

(3) Duplication. Duplication fees will be charged to all requesters, subject to the limitations of paragraph (d) of this section. For a paper photocopy of a record (no more than one copy of which need be supplied), the fee will be \$0.10 per page. For copies in digital format, HUD will charge the direct costs, including operator time, of producing the copy. Where paper documents must be scanned in order to comply with a requester's preference to receive the records in an electronic format, the requester shall pay the direct costs associated with scanning those materials. For other forms of duplication, HUD will charge the direct costs.

(4) Review. Review fees will be charged to requesters who make a commercial use request. Review fees will be charged only for the initial record review (the review done where HUD determines whether an exemption applies to a particular record or record portion, at the

initial request level). No charge will be made for review at the administrative appeal level for an exemption already applied. However, records or portions of records withheld under an exemption that is subsequently determined not to apply may be reviewed again to determine whether any other exemption not previously considered applies. The cost of that review is chargeable where it is made necessary by such a change of circumstances. Fees for the review time will be \$13 per quarter hour for professional personnel and \$6 per quarter hour for clerical personnel.

(d) Restrictions on charging fees. (1) No search fee will be charged for requests by educational institutions, noncommercial scientific institutions, or representatives of the news media. In addition, when HUD fails to comply with the applicable time limits in which to respond to a request and no unusual or exceptional circumstance, as those terms are defined by the FOIA, apply to the processing of the request, HUD will not charge search fees, or in the instances of requests from educational institutions, noncommercial scientific institutions, or representatives of the news media, as defined by paragraph (b) of this section, HUD will not charge duplication fees.

(2) Search and review fees will be charged in quarter-hour increments. HUD will round up a quarter hour when professional and clerical search and review time exceeds a quarter-hour increment.

(3) Except for requesters seeking records for a commercial use, HUD will provide without charge:

- (i) The first 100 pages of duplication (or the cost equivalent); and
- (ii) The first 2 hours of search (or the cost equivalent).

(4) No fee will be charged whenever a total fee calculated under paragraph (c) of this section is less than HUD's cost to process the payment. Currently, whenever a total fee calculated is \$25 or less, no fee will be charged.

(e) Notice of anticipated fees in excess of \$25. When HUD determines or estimates that the fees to be charged under this section will amount to more than \$25, HUD will notify the requester of the actual or estimated amount of the fees, unless the requester has indicated a willingness to pay fees as high as the amount anticipated. If only a portion of the fee can be readily estimated, HUD shall advise the requester that the estimated fee may be only a portion of the total fee. In cases in which a requester has been notified that actual or estimated fees amount to more than \$25, the request will be held in abeyance for 15 working days. Further work will not be done on that request until the requester has either made a firm commitment to pay the anticipated total fee, or has made payment in advance if the total fee exceeds \$250. Any such agreement should be memorialized by the requester in writing, should indicate a given dollar amount, and should be received by HUD within the time period specified by HUD in its notice to the requester. If the requester does not provide a firm commitment to pay the anticipated fee within the time period specified by HUD, the request will be closed. A notice under this paragraph will offer the requester an opportunity to discuss the matter of fees with HUD personnel in order to reformulate the request to meet the requester's needs at a lower cost. HUD is not required to accept payments in installments.

(f) Charges for other services. Although not required to provide special services, if HUD chooses to do so as a matter of administrative discretion, HUD will charge the direct costs of providing these services. Examples of such services include certifying that records are true

copies, providing multiple copies of the same document, or sending documents by means other than ordinary mail.

(g) Charging interest. HUD may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the date of the billing until payment is received by HUD. HUD will follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97–365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(h) Aggregating requests. If HUD reasonably believes that a requester or a group of requesters acting together is attempting to divide a request into a series of requests for the purpose of avoiding fees, HUD may aggregate those requests and charge accordingly. HUD may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. Where requests are separated by a longer period, HUD will aggregate them only where there is a reasonable basis for determining that aggregation is warranted under all the circumstances involved. Multiple requests involving unrelated matters will not be aggregated. Aggregation of requests for fee purposes under this paragraph will be conducted independent of aggregation of requests under §15.103(d).

(i) Advance payments. (1) For requests other than those described in paragraphs (i)(2) and (3) of this section, HUD will not require the requester to make an advance payment before work is begun or continued on a request. Payment owed for work already completed, such as prepayment before copies are sent to a requester, is not an advance payment.

(2) If HUD determines or estimates that a total fee to be charged under this section will be more than \$250, it may require the requester to make an advance payment of an amount up to

the amount of the entire anticipated fee before beginning to process the request, except where it receives a satisfactory assurance of full payment from a requester who has a history of prompt payment.

(3) If a requester has previously failed to pay a properly charged FOIA fee to HUD within 30 days of the date of billing, before HUD begins to process a new request or continues to process a pending request from that requester, HUD will require the requester to pay the full amount due, plus any applicable interest, and to make an advance payment of the full amount of any anticipated fee. If HUD has a reasonable basis to believe that a requester has misrepresented his or her identity in order to avoid paying outstanding fees, HUD may require that the requester provide proof of identity.

(4) When HUD requires advance payment, the request will be held in abeyance for 15 working days to allow the requester an opportunity to make payment in advance and/or modify the scope of the request. If the requester does not pay the advance payment or modify the scope of the request within the allotted time frame, the request will be closed.

(j) Other statutes specifically providing for fees. The fee schedule in this section does not apply to fees charged under any statute that specifically requires an agency to set and collect fees for particular types of records. Where records responsive to requests are maintained for distribution by agencies operating such statutorily based fee schedule programs, HUD will inform requesters of the contact information for that source.

(k) Requirements for waiver or reduction of fees. (1) Records responsive to a request will be furnished without charge or at a charge reduced below that established under paragraph (c) of this section if HUD determines, based on all available information, that the requester has demonstrated the following:

(i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and

(ii) Disclosure of the information is not primarily in the commercial interest of the requester.

(2) To determine whether the first fee waiver requirement is met, HUD will consider the following factors:

(i) The subject of the requested records should concern identifiable operations or activities of the Federal Government, with a connection that is direct and clear, not remote or attenuated.

(ii) The disclosable portions of the requested records should be meaningfully informative about government operations or activities and “likely to contribute” to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such increased understanding, where nothing new would be added to the public’s understanding.

(iii) The disclosure should contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester’s expertise in the subject area and ability and intention to effectively convey information to the public will be considered. It will be presumed that a representative of the news media will satisfy this consideration.

(iv) The public’s understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, should be enhanced by the disclosure to a

significant extent. However, HUD will not make value judgments about whether information at issue is “important” enough to be made public.

(3) To determine whether the second fee waiver requirement is met, HUD will consider the following factors:

(i) HUD will identify any commercial interest of the requester as defined in paragraph (b) of this section, or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters shall be given an opportunity in the administrative process to provide explanatory information regarding this consideration.

(ii) A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater than that of any identified commercial interest in disclosure. HUD ordinarily will presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

(4) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver will be granted for those records.

(5) Requests for the waiver or reduction of fees should address the factors listed in paragraphs (k)(2) and (3) of this section, insofar as they apply to each request. In deciding to grant waivers or reductions of fees, HUD will exercise its discretion to consider the cost effectiveness of its investment of administrative resources.

§ 15.107 Documents generally protected from disclosure.

The FOIA contains nine exemptions (5 U.S.C. 552(b)) that authorize agencies to withhold various records from disclosure. With regard to certain types of records, HUD generally applies the exemptions as follows:

(a) Classified documents. Exemption 1 (5 U.S.C. 552(b)(1)) protects classified national defense and foreign relations information. HUD seldom relies on this exception to withhold documents. However, where applicable, HUD will refer a request for records classified under Executive Order 13526 and the pertinent records to the originating agency for processing. HUD may refuse to confirm or deny the existence of the requested information if the originating agency determines that the fact of the existence of the information itself is classified.

(b) Internal agency rules and practices. Exemption 2 (5 U.S.C. 552(b)(2)) protects records relating to internal personnel rules and practices.

(c) Information prohibited from disclosure by another statute. Exemption 3 (5 U.S.C. 552(b)(3)) protects information that is prohibited from disclosure by another Federal law. HUD generally will not disclose competitive proposals prior to contract award, competitive proposals that are not set forth or incorporated by reference into the awarded contract, (see 41 U.S.C. 4702), or, during the selection process, any covered selection information regarding such selection, either directly or indirectly (see 42 U.S.C. 3537a).

(d) Commercial or financial information. Exemption 4 (5 U.S.C. 552(b)(4)) protects trade secrets and commercial or financial information obtained from a person that is privileged and confidential. HUD will handle this type of information as provided by § 15.108.

(e) Certain interagency or intra-agency communications. Exemption 5 (5 U.S.C. 552(b)(5)) protects interagency or intra-agency communications that are protected by legal

privileges, such as the attorney-client privilege, attorney work-product privilege, or communications reflecting the agency's deliberative process.

(f) Personal privacy. Exemption 6 (5 U.S.C. 552(b)(6)) protects information involving matters of personal privacy. This information may include personnel, medical, and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Names, addresses, telephone numbers, and email addresses of persons residing in public or assisted housing or of borrowers in FHA-insured single family mortgage transactions generally will not be disclosed.

(g) Law enforcement records. Exemption 7 (5 U.S.C. 552(b)(7)) protects certain records or information compiled for law enforcement purposes. This exemption protects records where the production could reasonably be expected to interfere with enforcement proceedings; for example, the names of individuals who have filed fair housing complaints. The protection of this exemption also encompasses, but is not limited to, information in law enforcement files that could reasonably be expected to constitute an unwarranted invasion of personal privacy; the names of confidential informants; and techniques and procedures for law enforcement investigations, or guidelines for law enforcement investigations if such disclosure could reasonably be expected to risk circumvention of the law.

(h) Supervision of financial institutions. Exemption 8 (5 U.S.C. 552(b)(8)) protects information relating to the supervision of financial institutions. For purposes of Exemption 8, HUD is an "agency responsible for the regulation and supervision of financial institutions" for purposes of monitoring fair housing compliance.

(i) Wells. Exemption 9 (5 U.S.C. 552(b)(9)) protects geological information on wells.

§ 15.108 Business information.

(a) In general. Business information obtained by HUD from a submitter will be disclosed under the FOIA only under this section. In making final confidentiality determinations under this section, HUD relies to a large extent upon the information furnished by the affected business to substantiate its claim of confidentiality. HUD may be unable to verify the accuracy of much of the information submitted by the affected business. HUD will comply with Executive Order 12600 and follow the procedure in this section by giving notice to the affected business and an opportunity for the business to present evidence of its confidentiality claim. If HUD is sued by a requester under the FOIA for nondisclosure of confidential business information, HUD expects the affected business to cooperate to the fullest extent possible in defending such a decision.

(b) Designation of business information. A submitter of business information will use good faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under Exemption 4. These designations will expire 10 years after the date of the submission unless the submitter requests, and provides justification for, a longer designation period.

(c) Notice to submitters. HUD will provide a submitter with prompt written notice of a FOIA request or administrative appeal that seeks business information, wherever required under paragraph (d) of this section, in order to give the submitter an opportunity to object to disclosure of any specified portion of that information under paragraph (e) of this section. The notice will either describe the business information requested or include copies of the requested records or portions of records containing the information. When notification of a voluminous number of submitters is required, notification may be made by posting or publishing the notice in a place reasonably likely to accomplish notification.

(d) Where notice is required. Notice will be given to a submitter wherever:

(1) The information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(2) HUD has reason to believe that the information may be protected from disclosure under Exemption 4.

(e) Opportunity to object to disclosure. HUD will allow a submitter a reasonable time to respond to the notice described in paragraph (c) of this section and will specify that time period within the notice. If a submitter has any objection to disclosure, the submitter should submit a detailed written statement specifying the grounds for withholding any portion of the information under any exemption of the FOIA and, in the case of Exemption 4, the submitter should show why the information is a trade secret or commercial or financial information that is privileged or confidential. HUD generally will not consider conclusory statements that particular information would be useful to competitors or would impair sales, or other similar statements, sufficient to justify confidential treatment. In the event that a submitter fails to respond to the notice within the time specified, the submitter will be considered to have no objection to the disclosure of the information. Information provided by the submitter that is not received until after the disclosure decision has been made will not be considered by HUD. Information provided by a submitter under this paragraph may itself be subject to disclosure under the FOIA.

(f) Notice of intent to disclose. HUD will consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose business information. Whenever HUD decides to disclose business information over the objection of a submitter, HUD will give the submitter written notice, which will include:

(1) A statement of the reason(s) why each of the submitter's disclosure objections was not sustained;

(2) A description of the business information to be disclosed; and

(3) A specified disclosure date, which shall be a reasonable time subsequent to the notice.

(g) Exceptions to notice requirements. The notice requirements of paragraphs (c) and (f) of this section will not apply if:

(1) HUD determines that the information should not be disclosed;

(2) The information lawfully has been published or has been officially made available to the public; or

(3) Disclosure of the information is required by statute (other than the FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600.

(h) Notice of a FOIA lawsuit. Whenever a requester files a lawsuit seeking to compel the disclosure of business information, HUD will promptly notify the submitter.

(i) Corresponding notice to requesters. Whenever HUD provides a submitter with notice and an opportunity to object to disclosure under paragraph (f) of this section, HUD will also notify the requester(s). Whenever a submitter files a lawsuit seeking to prevent the disclosure of business information, HUD will notify the requester(s).

§ 15.109 Appeals.

(a) In general. A requester may appeal an adverse determination denying a request, in any respect, in writing. The letter of appeal should clearly identify the determination that is being appealed and the assigned tracking number. The appeal letter and envelope should be marked "Freedom of Information Act Appeal" for the quickest possible handling. If mailed, the requester's letter of appeal must be postmarked within 30 calendar days of the date of HUD's

letter of determination. If the letter of appeal is transmitted electronically or by a means other than the United States Postal Service, it must be received in the appropriate office by the close of business on the 30th calendar day after the date of HUD's letter of determination.

(b) Time frames—(1) Expedited processing. HUD will decide an appeal of a denial of a request to expedite processing of a FOIA request within 10 working days of receipt of the appeal.

(2) All other appeals. HUD will make a determination on appeals within 20 working days of receipt, unless unusual circumstances require HUD to extend the time for an additional 10 working days.

(3) Exceptions. An appeal ordinarily will not be acted upon if the subject of the appeal is simultaneously being litigated in an applicable Federal court.

(c) Content of appeals. An appeal letter should include the following:

- (1) A copy of the original request;
- (2) A copy of the adverse determination;
- (3) A statement of facts and legal arguments supporting the appeal; and
- (4) Any additional information the appellant wishes to include.

(d) When appeal is required. Before seeking a court review of HUD's adverse determination, a requester generally must have exhausted their administrative remedies.

§ 15.110 HUD response to appeals.

(a) In general. (1) The appellate official will conduct a de novo review of the entire record and applicable law when making a decision.

(2) The decision on the appeal will be made in writing and will be considered the final action of HUD.

(i) A decision affirming an adverse determination, in whole or in part, will contain a statement of the reason(s) for the affirmation, including any FOIA exemption(s) applied, and will inform the appellant of the FOIA provisions for potential court review of the decision.

(ii) If the adverse determination is modified on appeal, in whole or in part, a written decision will be sent to the appellant and the FOIA request will be reprocessed in accordance with the appeal decision.

(iii) Adverse decisions will include the name and contact information of dispute resolution services that offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a nonexclusive alternative to litigation.

(b) Appeal of a denial of record request. Upon appeal of a denial of a record request, the appellate official will issue a decision that either:

(1) Overturns the adverse determination, in whole or in part, and remands the request to the appropriate office. The requester will be notified of the rationale for the determination in writing. The original office will then reprocess the request in accordance with the appeal determination and respond directly to the requester; or

(2) Affirms the adverse determination and declines to provide the requested records to the appellant.

(c) Appeal of a fee determination. Upon appeal of a fee determination, the appellate official will issue a decision that either:

(1) Waives the fee or charges the fee that the appellant requested;

(2) Modifies the original fee charged and explains why the modified fee is appropriate; or

(3) Advises the appellant that the original fee charged was appropriate and gives the reason behind this determination.

(d) Appeal of a denial of expedited processing. Upon appeal of a denial of an expedited processing request, the appellate official will issue a decision that either:

- (1) Overturns the adverse determination and grants the expedited processing request; or
- (2) Affirms the decision to deny expedited processing.

Date: August 7, 2015

Nani A. Coloretti, Deputy Secretary

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